

corrigible. A great part of his adulthood has been spent in prison and it may perhaps do the society some good if he is kept away from the public. I therefore set aside the order of the learned magistrate and substitute therefor a sentence of 10 years' imprisonment and six strokes of the rattan followed by 12 months' police supervision. I would have preferred to put him under a longer police supervision but as this is an appeal which is by way of a retrial I am of the view that I should not impose upon him a punishment higher than what the learned magistrate could have imposed, or subject him to such period of police supervision which the learned magistrate could not have lawfully subjected him to. I vary that part of the order of the learned magistrate which relates to 2 years' imprisonment and substitute therefor a term of imprisonment for 10 years and this I do in view of the provisions of section 87(2) of the Courts Ordinance, which I think the learned magistrate failed to take into account. The rest of the order of the learned magistrate will remain effective and unaltered.

The legislature enacted section 87(2) of the Courts Ordinance to meet the situation where an offence is committed by an accused with a very bad record. It was a most proper case in which the learned magistrate should have exercised his powers under that subsection.

Order accordingly.

LEE KONG YIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) June 11, 1970]

[Malacca — Criminal Appeal Nos. 17 and 18 of 1969]

Criminal Law and Procedure — Trial — Statement of accused from dock — Accused making unsworn statement — Trial court allowing prosecution counsel to make submission on statement but not allowing defence counsel to do so — Improper exercise of discretion — Criminal Procedure Code (Cap. 21), ss. 5 and 184.

In this case the appellant was charged under section 409 and 477A of the Penal Code and was found guilty and convicted by the learned president. The accused had made a statement from the dock and produced no witnesses. The defence counsel thereupon addressed the court and began to comment and deal with the statement his client had made from the dock. The prosecuting officer objected to the right of the defence to comment on that statement and the learned president upheld the objection. He however allowed the prosecuting officer, despite the objections of defence counsel, to make his submissions on the statement.

Held, allowing the appeal and ordering a retrial: the learned president had a discretion, to allow the defence counsel to make a submission on the statement of the accused, but in this case he did not exercise the discretion judicially or on sound principles. The refusal by the learned president to the defence counsel to address the court in a matter on which the learned president allowed the prosecution to address him appeared to be unjust on the face of it and was not a proper exercise of discretion by the learned president. The conviction must therefore be quashed and a retrial ordered.

Cases referred to:-

(1) *Public Prosecutor v. Sanassi*, ante p. 198.

- A (2) *Wong Heng Fatt v. Public Prosecutor* [1959] M.L.J. 20.
- (3) *Manickam v. R.* [1948] M.L.J. 185.
- (4) *Lam Heng v. R.* [1937] M.L.J. 154.
- (5) *Chow Kwan v. Public Prosecutor* [1943] M.L.J. 64.
- (6) *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256.
- B (7) *Vinayak Laxman Bhatkande v. Emperor* A.I.R. 1928 Bom. 557.
- (8) *Hurry Churn Chuckerbutty v. Empress* I.L.R. 10 Cal. 140.
- (9) *Mahindar Singh v. Public Prosecutor* [1941] M.L.J. 230.

CRIMINAL APPEAL.

C *Edgar Joseph Jr.* for the appellant.

Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Sharma J. (delivering oral judgment): The appellant was charged under sections 409 and 477A of the Penal Code and found guilty and convicted by the learned president who sentenced him to six months' imprisonment on each charge. It is not necessary to deal with the merits or otherwise of the various grounds of appeal. I have heard the counsel for the parties only on one ground and the appeal could be dealt with on the preliminary point raised by the appellant.

E The accused made a statement from the dock when he was asked to enter on his defence and he produced no witnesses. The learned president having taken down the statement of the accused from the dock, the defence counsel started with his submissions and began to comment on and deal with the statement his client had made from the dock. The prosecuting officer objected to the right of the defence to comment on that statement and the learned president upheld the objection. The prosecuting officer began making his submissions and now the defence counsel objected to the prosecuting officer dealing with or commenting on the unsworn statement of the accused made from the dock. The defence counsel's objection was over-ruled and the learned president allowed the prosecuting officer to comment on the statement of the accused from the dock.

G I have already held in *Public Prosecutor v. Sanassi*⁽¹⁾ that a statement made by an accused from the dock is not evidence, although the court has to consider such a statement for whatever it is worth. The accused cannot be called a "witness" in the strict sense of the word as the statement he makes is not made on an affirmation. The learned president was referred to the authority of *Wong Heng Fatt v. Public Prosecutor*⁽²⁾ where Smith J. held that the accused had no right to make any submission if he chose to make a statement from the dock. In that case reliance was placed upon the wording of section 174 of the Criminal Procedure Code (F.M.S.) which for convenience I will read out:

"In summary trials under this Chapter —

- (i) The officer conducting the prosecution need not open the case but may forthwith produce his evidence.
- (ii) When the accused is called upon to enter on his defence, he or his advocate may before producing his evidence open his case stating the facts or law on which he

intends to rely and making such comments as he thinks necessary on the evidence for the prosecution, and if the accused gives evidence or witnesses are examined on his behalf may sum up his case.

- (iii) The officer conducting the prosecution shall have the right of reply on the whole case when the accused has adduced evidence."

The relevant section in the Straits Settlements Criminal Procedure Code is section 184 which reads as follows:

- "(1) Without the permission of the court the complainant shall not be entitled to make any observations in reply upon the evidence produced by the accused nor shall the accused be entitled to make any observations in reply upon the evidence, if any, produced by the complainant in reply.
- (2) The Public Prosecutor shall have the right to reply on the whole case when the accused has adduced evidence."

It will thus be seen that the provisions of section 184 of the Straits Settlements Criminal Procedure Code are not the same as those of section 174 of the F.M.S. Criminal Procedure Code.

In the case of *Manickam v. Rex*⁽³⁾ Murray-Aynsley C.J. said:

"... The question of the right of parties and counsel to make speeches in summary cases is in a state of some confusion. It was dealt with at length by Horne J. in the case of *Lam Heng*.⁽⁴⁾ There the learned judge came to the conclusion that the address by counsel must in a case like the present one be made after the person accused has given his evidence and not before. I do not agree entirely with the reasoning of that learned judge but I consider that both from the point of view of the defence and also in the interests of justice it is desirable that any address by counsel should be made at that stage. I may also add that I consider it desirable that, where witnesses for the defence other than the accused have been called, counsel should be permitted to postpone their address until after the calling of such witnesses. This is, of course, a matter for the discretion of the court."

If no evidence is led for the defence, the prosecution does not have a right of reply on the whole case (see *Chow Kwan v. Public Prosecutor*⁽⁵⁾).

Horne J. has dealt with the provisions of section 184 of the Straits Settlements Criminal Procedure Code in the case of *Lam Heng v. Rex*.⁽⁴⁾

If one has to call in aid section 5 of the Straits Settlements Criminal Procedure Code, one may perhaps with profit look at the order of addresses as summarised in *Archbold*, 35th edition, paragraph 560, at page 197.*

"The laws of procedure are grounded on the principles of natural justice which require that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Subject to clearly defined exceptions, the laws of procedure should be construed, wherever reasonably possible, in the light of that principle. The court is invested with the widest possible discretion to see that justice is done to all concerned." No hard and fast rule can be laid down in this regard.

- A The court in the exercise of its judicial discretion will have in a given case to determine how to exercise its discretion to further the principles of natural justice. I need only repeat what was said in the case of *Rex v. Sussex Justices ex parte McCarthy*⁽⁶⁾ that "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

- B In the case of *Vinayak Laxman Bhaskande v. Emperor*⁽⁷⁾ it was held that "the right of counsel in criminal matters was not only that they should be heard but that they should be given an opportunity of being effectually heard. Where counsel on behalf of his client has a right of being heard last (where the accused has not called any evidence in his behalf) in the matter, counsel is entitled to an opportunity to be so heard."

- C In the case of *Hurry Churn Chuckerbutty v. The Empress*⁽⁸⁾ Prinsep J. said:

- "It appears that at the close of the evidence for the prosecution, and before rising for the day, the Sessions Judge inquired and learnt from the attorney for the accused that he meant to adduce evidence for the defence. When the trial was resumed on the following day, the attorney intimated that, upon reconsideration, he did not intend to adduce any evidence. On this the Sessions Judge apparently informed him that the Prosecutor would nevertheless have the right of reply, and on its being claimed, in spite of an objection raised, he conceded it."

- D Now, no doubt the strict interpretation of the terms of ss. 289 and 292 would warrant this, but we think that this was never contemplated by the legislature, and certainly should not have been allowed by the judge, when in fact no evidence was produced for the defence. The object of the law evidently is to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor simply because the pleaders for a prisoner may, after consultation during an adjournment, have had an opportunity of considering what was best for the interests of their client. The incautious reply of the attorney at the end of the day should not have prejudiced his client on the resumption of the trial, and can properly be regarded only as the expression of an intention then entertained subject to further consideration."

- E My attention was drawn to the provisions of section 448 of the Straits Settlements Criminal Procedure Code and I was asked to hold that the decision of the learned president to take the stand which he did was merely an irregularity which did not vitiate the trial, as there was no failure of justice. The error or defect which must be assumed to have necessarily caused injustice to the parties cannot be cured under this section. It is a fundamental principle of law that no order should be passed to the prejudice of anyone without hearing him. A breach of this principle must necessarily result in injustice and would call for the setting aside of the proceedings. Where the law vouchsafes to a party the right of reply and the court refuses him such right the result must necessarily be unjust and it will be unnecessary to consider whether actually any prejudice was caused.

- I The learned president seems to have ignored the provisions of section 184 of the Straits Settlements Criminal Procedure Code. If the question of allowing the defence counsel to make a submission on the statement which the accused had made from the dock was entirely in the discretion of the learned president this discretion had to be exercised judicially and on

* Now *Archbold*, 37th Edn. § 561, at pp. 160 and 162.

sound principles. The refusal by the learned president to the defence counsel to address the court on a matter in which the learned president allowed the prosecution to address it on the face of it appears unjust and this I think was not a proper exercise of the discretion by the learned president. It was obviously unjust and it is consequently unnecessary to consider whether actually any prejudice was caused to the accused or not.

The record of the proceedings gives the impression that the learned president took the view that the prosecution had a right as it were to comment on the statement made by the accused from the dock and the learned president further seems to have held that the counsel for the accused could not address him at all on such a statement. I fail to understand how he arrived at that conclusion. I have already said that it is not necessary for me to consider whether there was any actual prejudice caused to the accused or not by such a decision of the learned president.

In the case of *Mahindar Singh v. Public Prosecutor*⁽⁹⁾ the accused's counsel was never given an opportunity of addressing the court at the close of the case. In the present case the accused's counsel was deprived of an opportunity of addressing the court on a part of the case for the defence. The principles applicable, however, are the same. Retrial was ordered in *Mahindar Singh's* case and I propose to do the same. The appeal is consequently allowed, convictions set aside and a retrial ordered.

Appeal allowed. Retrial ordered.

Solicitors: *Joseph & Son.*

LIM KIM CHAI & ANOR. v. FOO SEE FATT; GAN CHIN BAW & ANOR. v. FOO SEE FATT

[O.C.J. (Sharma J.) June 13, 1970]

[Muar — Civil Suit Nos. 59 and 60 of 1968]

Negligence — Res ipsa loquitur — Defence of inevitable accident — Onus on defendant.

Damages — Fatal accident — Loss of dependency — Award — Apportionment of.

In this case two cyclists had been knocked down by a van driven by the defendant. The cyclists were travelling on their correct side of the road at the time of the accident. The defendant's van had gone diagonally across to the other side of the road and had knocked down the two cyclists. The plaintiffs pleaded *res ipsa loquitur*. The defence relied on was that of inevitable accident. The defendant said that he had a momentary blackout at the time of the accident and consequent loss of consciousness and it was due to this that his van had gone to the wrong side of the road. He said he had been suffering from an attack of flu and cough which lasted for three days immediately prior to the date of accident.

Held: the onus of proving inevitable accident is on the defendant and on the facts of this case the defendant had not discharged this onus. The accident occurred because the defendant felt drowsy while driving and had fallen asleep and it was this act of falling asleep which was the cause of the accident.

A Cases referred to:-

- (1) *The Merchant Prince* (1892) P.D. 179, 189.
- (2) *Kay v. Butterworth* 61 T.L.R. 452.
- (3) *Browne v. De Luxe Car Services* [1941] 1 K.B. 549, 552.

CIVIL SUIT.

D. Murphy for the plaintiffs.

D. G. Ironside for the defendant.

Cur. Adv. Vult.

Sharma J.: On July 8, 1966 two cyclists, Tee Kim Yam and Teh Suan Yam, were cycling on the Batu Pahat/Rengit Road in the direction of Rengit when at about 12.30 p.m. both of them were knocked down by a motor van bearing registration number JC 7109 which was coming from the opposite direction. Both the cyclists were travelling on their proper side of the road at the time of the accident. Motor van JC 7109 was driven by the defendant. The defendant knocked down the two cyclists and thereafter ran into a telephone post. The defendant's vehicle had admittedly gone diagonally across to the other side of the road and beyond. Both the cyclists died as a result of the accident.

The plaintiffs in Civil Suit No. 59 of 1968 are the administratrix and the co-administrator respectively of the estate of Tee Kim Yam and the plaintiffs in Civil Suit No. 60 of 1968 are the administratrix and the co-administrator respectively of the estate of Teh Suan Yam.

The plaintiffs have in the circumstances of this case pleaded *res ipsa loquitur*. The only issue which is involved in this suit is the issue of inevitable accident which is contained in paragraph 3 of the statement of defence. It was very rightly conceded by Mr. Ironside, counsel for the defendant, that the burden of proving inevitable accident lay on the defendant. In order to do that he must either show what was the cause of the accident and satisfy the court that the result of that cause was inevitable. Fry L.J. in the case of *The Merchant Prince*⁽¹⁾ said:

"The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident."

In the present suit, the defendant has endeavoured to show what he regards as the cause of the accident. According to him, he had an attack of flu and cough which lasted for three days immediately prior to the date of the accident, i.e. July 8, 1966. On the morning of that day, he says, he felt fit to drive the van and commenced his business trip in the van at 7.30 a.m. accompanied by the attendant, Lim Ah Kow (D.W. 2). The defendant was an assistant in a bakery business and had to make deliveries of biscuits during the course of his journey at various places. The defendant drove the van. According to him, he had covered a distance of only 54 miles between 7.30 a.m. and 12.30 p.m. when